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North Dakota Choice of Law in Tort and Contract Actions: A Summary of Cases and a Critique

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I. INTRODUCTION

Choice of law becomes a legal necessity when the facts of a given case relate to more than one jurisdiction.[1] In these situations, the forum court is often forced to apply the law of at least one of the jurisdictions related to the action by making a "choice-of law."[2] North Dakota currently uses the "significant contacts" method when deciding conflicts of law issues.[3] This rule was borrowed from *Babcock v. Jackson*,[4] a New York Court of Appeals case.[5] This Note is designed as a primer for practitioners who are faced with choice of law problems regarding the application of North Dakota law in tort or contract-based actions.

In order to fully understand the North Dakota rules, it will first be necessary to explore the larger context of choice of law theories in general. Part I of this Note will examine the most prominent theories of choice of law from the traditional method which North Dakota rejected in *Issendorf v. Olson*[6] to some of the modern theories currently in use.[7] While this Note does not purport to be a survey of choice of law theories, it is helpful to be minimally familiar with the variety of theories in order to better understand the North Dakota rules. Part II will begin an in-depth examination of North Dakota's choice of law rules in tort related actions. Part III will analyze the primarily contract-based caselaw in the post-*Issendorf* era to extract some of the more common elements to consider when faced with a choice of laws question in North Dakota. As there are relatively few North Dakota Supreme Court cases dealing with choice of law issues, federal cases using the North Dakota rules will be used to supplement the state cases.

A. A GENERAL OVERVIEW OF MAJOR CHOICE OF LAW THEORIES

The Restatement of Conflict of Laws[8] requires that the law of the jurisdiction where the plaintiff acquired his or her right of action applies.[9] The First Restatement concerned itself primarily with allocating

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1. ROBERT A. LEFLAR ET AL., AMERICAN CONFLICTS LAW § 2, at 3 (4th ed. 1986).
2. *Id.*
3. Issendorf v. Olson, 194 N.W.2d 750, 756 (N.D. 1972).
4. 191 N.E.2d 279 (N.Y. 1963).
5. Babcock v. Jackson, 191 N.E.2d 279 (N.Y. 1963).
6. 194 N.W.2d 750 (N.D. 1972).
7. Issendorf v. Olson, 194 N.W.2d 750 (N.D. 1972).
8. RESTATEMENT OF CONFLICT OF LAWS (1934) [hereinafter FIRST RESTATEMENT].
9. *Id.* § 377. This rule means that the law of the place of the incident at issue between the parties would govern the substantive elements of the action. For example if P, a resident of state X was injured by D in state Y, both parties would be subject to the applicable laws of state Y without regard

the rights and responsibilities of the parties based upon the particular action.[10] North Dakota originally used this basic theory for tort and contract-based actions, but has since modified its approach in both contexts.[11]

While many jurisdictions have abandoned the First Restatement approach to conflicts of law questions in favor of other methods, some jurisdictions have continued to cling to its tenets.[12] An addition to choice of law theory was constructed to remedy perceived deficiencies in the First Restatement.

The Restatement (Second) of Conflict of Laws[13] established a model of considerations to be examined by a forum court in determining which law to apply.[14] The Second Restatement is more flexible in the determination of law than its predecessor because it considers various factors related to the contact between the parties. The apparent flexibility of the Second Restatement has led a number of states to use it instead of the

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to the laws of state X. *Id.*

10. *See* FIRST RESTATEMENT, *supra* note 8, §§ 332-347 (applying *lex loci contractus* principles, or literally place of the contract). *See also Id.* §§ 377-83 (applying *lex loci delicti* or place of the wrong to tort actions).

11. Nordenstrom v. Swedberg, 143 N.W.2d 848, 855 (N.D. 1966). The *Nordenstrom* court applied section 9-07-11 of the North Dakota Century Code which required the law of the place of contract performance to be the governing law. *Id.* (applying N.D. CENT. CODE § 9-07-011 (1957)). This statute was abolished by 1973 N.D. Laws 77, § 1. *See also* Pearson v. Erb, 82 N.W.2d 818, 821-22 (N.D. 1957) (applying the place of the wrong theory to a tort action). *See infra* parts II and III (discussing North Dakota's *current* choice of law rules).

12. *See, e.g.*, Jones v. R.S. Jones and Assoc., Inc. 431 S.E.2d 33, 34 (Va. 1993) (affirming the First Restatement); V-1 Oil Co. v. Ranck, 767 P.2d 612, 616 (Wyo. 1989) (adhering to the principles of *lex loci delicti*). *See also* Giorgio v. Nukem, Inc., 624 A.2d 896, 898 n.3 (Conn. App. Ct. 1993) (noting that FIRST RESTATEMENT principles in contract actions have governed until recently); Bourdeau v. Baughman, 368 S.E.2d 849, 853-54 (N.C. 1989) (stating that the place of the making governed the contract); Cherry Creek Dodge, Inc. v. Carter, 733 P.2d 1024 (Wyo. 1987) (affirming loyalty to *lex loci contractus*). *See generally* Paul v. National Life Ins., 352 S.E.2d 550 (W. Va. 1986) (rejecting arguments for a modern replacement of the First Restatement).

13. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971) [hereinafter SECOND RESTATEMENT]

14. *Id.* The Second Restatement provides that:

> When there is no statutory mandate in the forum state as to choice of laws, the trial court should consider:
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> (a) the needs of the interstate and international systems,
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> (d) the protection of justified expectations,
> (e) the basic policies underlying the particular field of law,
> (f) certainty, predictability, and uniformity of result, and
> (g) ease in the determination and application of the law to be applied.

Id.

First Restatement method.[15] However, with its appealing flexibility comes the problem of qualifying the contacts related to the issue in dispute.[16] The Second Restatement suggests that certain contacts may be more important than others.[17]

While the Second Restatement considers the incident in relation to various enumerated factors, an interest-based theory looks to the presumed interests of the governmental entities. The governmental interest analysis theory was initially set out in the 1950s by Brainerd Currie.[18] Currie asserted that a choice of law problem really was not one of law, but rather one of competing interests of respective governments affected by the action.[19] Currie's position was that if the interests of one jurisdiction are greater than another, then the more interested jurisdiction's law should have force.[20] Interest analysis, in varying forms, is the rule adopted by a number of courts as an alternative to the summary results of the First Restatement.[21] Interest analysis of various stripes appears to be embedded firmly in choice of law thought,[22] and there appears to be no indication of judicial disapproval of its use in the near future.[23]

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15. *See, e.g.* , State Farm Mutual Ins. Co. v. Mendiola, 865 P.2d 909, 911 (Colo. Ct. App. 1993) (applying the SECOND RESTATEMENT to interpretations of insurance policies); Int'l Surplus Lines Ins. Co. v. Pioneer Life Ins. Co., 568 N.E.2d 9, 13-16 (Ill. App. Ct. 1990) (utilizing the SECOND RESTATEMENT method in contract actions); America Home Assurance Co. v. Safway Steel Prod. Co., 743 S.W.2d 693, 696-701 (Tex. Ct. App. 1988) (applying the SECOND RESTATEMENT to contract issues). *See also* Diamond State Ins. Co. v. Chester-Jenson Co., 611 N.E.2d 1083, 1093-95 (Ill. App. Ct. 1993) (deciding the issue under SECOND RESTATEMENT analysis); Gutierrez v. Collins, 583 S.W.2d 312, 318-319 (Tex. 1979) (applying the SECOND RESTATEMENT to tort actions).

16. *See* Peter Hay, *Reflections on Conflict of Law Methodology*, 32 HASTINGS L.J. 1644, 1667 (1981) (commenting on the potential subjectivity of a SECOND RESTATEMENT analysis).

17. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 145(2) (1971). The Second Restatement suggests that contacts to be given more consideration in the application of section six include:

> (a) [T]he place where the injury occurred,
> (b) the place where the conduct causing the injury occurred,
> (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
> (d) the place where the relationship, if any, between the parties is centered.
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Id.

18. *See generally* BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963) (compiling a series of articles in which Currie formulated his theory of interest analysis).

19. *Id.* at 621. Currie emphasized the primary importance of governmental interests in choice of law analysis. *Id.*

20. *Id.* at 183-84. Currie believed that a court must primarily consider three contacts related to the action: 1) where the parties are domiciled, 2) the locus of the event, and 3) the forum for the action to fully consider the relative interests of the states. *Id.* at 82-83.

21. *See e.g.*, Armstrong v. Armstrong, 441 P.2d 699 (Alaska 1968); Simaitis v. Flood, 437 A.2d 828 (Conn. 1980); Saharceski v. Marcure, 366 N.E.2d 1245 (Mass. 1977) (applying varying degrees of interest analysis to choice of law problems).

22. *See* LEFLAR, *supra* note 1, § 91 at 268-69 (discussing the wide acceptance of varying degrees of interest analysis by courts and academics and how it tends to pervade choice of law theory in general).

23. *Id. But see* Gregory E. Smith, *Choice of Law in the United States*, 38 HASTINGS L. J. 1041,

An attempt to narrow the range of interest analysis was signaled by a recent entrant into the choice of laws arena. This consideration-based theory was derived from a law review article written by Robert A. Leflar.[24] Leflar outlined five considerations he believed were present in every choice of law decision.[25] Leflar theorized that such considerations should be stated with "particularity" as a test for the "rightness" of a given result.[26] Perhaps because these concerns are presented in most choice of law problems, some courts have adopted the considerations as their choice of law rules.[27]

A retreat from subjective analysis has been seen in New York for tort problems. The New York choice of law rules consider the place of the tort and the domiciles of the parties when deciding choice of law issues.[28] The New York rules are fairly simple and specific as to a particular action and represent a change from the subjectivity and unpredictability often accorded to trial courts in some of the competing modern theories.[29]

A common theme that appears to be consistent in the modern theories is a general analysis of the impact of the choice of law on the

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1048 (1987) (arguing that interest analysis is ineffective due to its forum biased subjectivity).

24. Robert A. Leflar, *Choice Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966). Leflar was a Distinguished Professor of Law at the University of Arkansas and Professor of Law at New York University. *Id.*

25. *Id.* at 282. The considerations are as follows:

1. Predictability of results;
2. maintenance of interstate and international order;
3. simplification of the judicial task;
4. advancement of the forum's governmental interests;
5. application of the better rule of law.

Id.

26. *Id.* at 281. The North Dakota Supreme Court has stated the considerations, without really explaining their role in a significant contacts analysis, in a number of decisions so it is difficult to determine their place in a North Dakota choice of law question. See parts II and III *infra*, for a more detailed analysis of Leflar's theory in North Dakota choice of law cases.

27. *See, e.g.*, Milkovich v. Saari, 203 N.W.2d 408, 412-17 (Minn. 1973) (adopting Leflar's considerations as Minnesota's choice of law rule); Clark v. Clark, 222 A.2d 205, 207-08 (N.H. 1966) (rejecting the traditional approach in favor of Leflar's considerations); Heath v. Zellmer, 151 N.W.2d 664, 672-76 (Wis. 1967) (using Leflar's theory to decide choice of law problems).

28. *See* Neumeier v. Kuehner, 286 N.E.2d 454, 457-58 (N.Y. 1972) (defining New York's choice of law rules in tort actions). The rules are summarized as follows:

> 1. When the parties are domiciliaries of the same state, that state's law as to duties and defenses shall govern the action;
> 2. When the conduct occurs in the domicile of one of the parties, that party is entitled to whatever rights and obligations the locus state provides;
> 3. When neither party is domiciled in the locus of the tort, the law of that place shall govern, unless a party can prove that its displacement will not impair the substantive purposes of the law.

Id. See also Schultz v. Boy Scouts of America, Inc. 480 N.E.2d 679, 687-89 (N.Y. 1985) (appearing to add a fourth "public policy" option to the New York rules).

29. *See Neumeier*, 286 N.E.2d at 457-58 (discussing the New York court's desire for simplicity and predictability).

respective jurisdictions.[30] Rather than just restating traditional factors, such as the place of the incident or the domicile of the parties as analytical considerations, with New York as the recent exception, the modern theories tend to place the interests of the jurisdiction above those of the individuals involved.[31] "Policy" appears to be the often unspoken common denominator in the Second Restatement interest analysis and Leflar's theory. It would appear that the interests of the parties are often subordinate to the interests of the states involved.[32]

While this section was not intended to be a thorough dissection of the different theories, it was intended to show the practitioner some of the most basic elements of the major theories in force today. The next section will deal exclusively with North Dakota's experience with choice of law in tort cases and how the law has become increasingly clouded as it has evolved.

II. NORTH DAKOTA'S CHOICE OF LAW RULES IN TORT ACTIONS

North Dakota has had a relatively sparse, yet fairly interesting, relationship with choice of law cases. While the majority of the cases to be analyzed in this Note pertain to contract or insurance situations; the earliest pivotal cases involved tort actions. This section will consider the evolution of North Dakota's choice of law rules in tort actions and analyze the decisions with an eye to determine whether the reasoning expressed justified the result. In many cases, more than one theory was expressed by the court; this often compounded the original problem. Therefore, the key difficulty in analyzing North Dakota choice of law cases often lies in deciding which theory created the result.

A. NORTH DAKOTA AND THE PLACE OF THE WRONG

The first reported North Dakota case dealing with a choice of law problem was *Pearson v. Erb*.[33] *Pearson* involved a North Dakota resident passenger who was injured in a car accident in Minnesota.[34] The plaintiff commenced the action for property and personal injuries in

30. *See, e.g., supra* notes 12-16 and accompanying text (discussing the Second Restatement approach); *see also* notes 23-26 and accompanying text (discussing Leflar's considerations).

31. *See supra* notes 17-22 and accompanying text (discussing Currie's interest analysis theory). It can be argued that interest analysis generally does not consider the concerns of the individuals involved to be of any significance. CURRIE, *supra* note 18, at 82-83.

32. *See supra* notes 12-27 and accompanying text (discussing the respective theories).

33. 82 N.W.2d 818 (N.D. 1957).

34. Pearson v. Erb, 82 N.W.2d 818, 820-21 (N.D. 1957). The plaintiff was the owner of the car and his wife was driving it with his "permission" as he sat beside her. *Id.* at 820. The car struck the defendant's vehicle which had failed to signal in preparation for a turn. *Id.* at 821.

Cass County, North Dakota.[35] A jury returned a verdict for both the plaintiff and the defendant.[36] Both parties appealed to the North Dakota Supreme Court.[37] Upon review, the supreme court applied the "place of the wrong" rule to the case.[38] The court relied on the reporter of the First Restatement, Joseph H. Beale, for guidance in choosing to apply Minnesota law.[39] Under Minnesota law, a person driving an automobile with the consent of the owner was deemed to be an "agent of the owner."[40] Accordingly, in *Pearson* the supreme court determined that, under Minnesota law, the plaintiff was negligent by imputation, as he did nothing to surrender his "control" of the vehicle and his wife remained his "agent."[41] As a result, the court reversed the trial court and directed that a verdict be entered in the defendant's favor.[42]

In *Pearson,* the North Dakota Supreme Court demonstrated a good understanding of the main choice of law theory present in that day. The court applied Minnesota law after analyzing relevant cases to determine if the trial court had erred in its instructions.[43] While the analysis involved was fairly basic, *Pearson* was a good model of choice of law analysis as it fairly and objectively considered the law of a foreign jurisdiction.[44]

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35. *Id.* at 818.

36. *Id.* at 820. The jury awarded the plaintiff $5,588.27 and the defendant $363.05 on a counterclaim. *Id.* The trial court denied the defendant's motions for a directed verdict or a judgment notwithstanding the verdict, but it did grant the defendant's motion for a new trial. *Id.* While the trial record is not very clear as to this issue, it appears that the trial court utilized the traditional choice of law rule.

37. *Id.*

38. *Id.* The court decided that "[t]he accident having happened in the State of Minnesota, the liabilities of the parties must be determined according to the laws of that state." *Id.* at 821.

39. *Pearson*, 82 N.W.2d at 822. *See generally* JOSEPH H. BEALE, CONFLICT OF LAWS (1935) (incorporating much of the FIRST RESTATEMENT's tenets into his treatise).

40. *Pearson*, 82 N.W.2d at 822. The court cited section 170.54 of the Minnesota Statutes, which considered the non-owner operator of a vehicle as the "agent of the owner in the operation of the motor vehicle." *Id.* (quoting MINN. STAT. § 170.54). It appears that this statute imputed the agent's negligence to the owner, and thus barred recovery if the driver was found contributorily negligent and the owner was injured. *See, e.g.*, Christensen v. Hennepin Transp. Co., 10 N.W.2d 406 (Minn. 1943) (discussing imputation between spouses); Frankle v. Twedt, 47 N.W.2d 482 (Minn. 1951) (discussing imputation of fault to the owner-plaintiff).

41. *Pearson*, 82 N.W.2d at 827. The court found "[t]heir mission was as much or more for his benefit as for hers." *Id.* The plaintiff and his wife were going to his parents for Thanksgiving. *Id.* at 820.

42. *Id.* at 827. The court also noted that the trial court erred in ordering a new trial. *Id.*

43. *Id.* at 822-25. The analysis actually concerned itself more with imputation of negligence rather than discussing choice of law. *Id.* at 824-27.

44. The North Dakota Supreme Court gave great deference to Minnesota law when considering the substantive elements of the negligence claim, as North Dakota law only controlled the initial choice of law issue. *Id.* at 821-22.

B. NORTH DAKOTA'S CHOICE OF LAW "REVOLUTION"

In the years following *Pearson*, there were no new reported tort-related choice of law cases in North Dakota until *Issendorf v. Olson*.[45] *Issendorf* concerned a car accident in Minnesota involving North Dakota residents.[46] The plaintiff commenced suit shortly after the accident.[47] At the conclusion of trial, the trial judge advised the jury as to North Dakota's law of contributory negligence over the plaintiff's objection.[48] In so doing, the trial court ignored the *Pearson* "place of the wrong" precedent.[49] The trial court also instructed the jury on Minnesota law at the time of the accident.[50] The jury found in favor of the defendant, and the plaintiff's motion for a new trial was denied.[51]

On the plaintiff's appeal, the North Dakota Supreme Court took the opportunity to analyze some of the recent changes in the choice of law arena.[52] The court quoted the New York Court of Appeals' *Babcock* decision exhaustively in its opinion.[53] The court listed Leflar's choice influencing considerations as well.[54]

The court then listed the various "interest factors" as argued by the respective parties.[55] The court noted that the plaintiff was a North

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45. 194 N.W.2d 750 (N.D. 1972).

46. Issendorf v. Olson, 194 N.W.2d 750, 752 (N.D. 1972). Both parties, residents of North Dakota, were traveling through Moorhead, Minnesota on their way back to North Dakota after an evening of social activity. Brief for Appellant at 22-24, Issendorf v. Olson, 194 N.W.2d 750 (N.D. 1972) (Civ. No. 8775). During a demonstration of his car's performance, the defendant lost control of his vehicle, thus injuring the plaintiff. *Id.*

47. *Issendorf*, 194 N.W.2d at 752. During the pretrial proceedings the trial court granted the plaintiff's motion to strike the affirmative defenses of North Dakota's guest passenger statute as had been asserted by the defendant. *Id.*

48. *Id.* at 752.

49. *Id.* The plaintiff had sought to have the jury instructed on Minnesota's new comparative fault law which became effective prior to trial and which had a prospective effect on trials beginning after July 1, 1969. *Id.* *See* MINN. STAT. § 604.01 (1969) (establishing a comparative negligence standard). The original summons and complaint had been served in June, 1968, while the trial commenced in November, 1969. *Issendorf*, 194 N.W.2d at 752.

50. Brief for Appellee at 12-13, Issendorf v. Olson, 194 N.W.2d 750 (N.D. 1972) (Civ. No. 8775). At the time of the accident, Minnesota still utilized rules of contributory negligence. *Id.*

51. *Issendorf*, 194 N.W.2d at 752.

52. *Id.* at 753. More precisely, the earlier *Pearson* rationale was held up to the light of the significant contacts rule set out in Babcock v. Jackson, 191 N.E.2d 279 (N.Y. 1963). *Issendorf*, 194 N.W.2d at 753.

53. *Issendorf*, 194 N.W.2d at 753-54. Much of the reasoning expressed by the North Dakota Supreme Court was lifted verbatim from the *Babcock* decision with very little analysis of the "significant-contacts" theory it had adopted. *Id.*

54. *Id.* at 755. *See supra* notes 24 through 27 and accompanying text (outlining Leflar's considerations). The court gave no indication whether Leflar influenced its decision, but future cases would also include references to Leflar's considerations. *See* notes 64-143 *infra* and accompanying text (analyzing later *Issendorf*-based case law).

55. *Issendorf*, 194 N.W.2d at 755. The court examined the parties' contacts to each state as set forth in the early trial briefs. *Id.* Examination of the appellate briefs shows that the parties did not consider choice of law to be an important issue as neither side really contested the validity of *Pearson*

Dakota resident and that his lost income and medical expenses affected North Dakota's economy.[56] Other important "factors" considered by the court included the facts that the car was registered and insured in North Dakota, as well as that it was driven by a North Dakota resident.[57]

The court then recited the factors, leaning to the application of Minnesota law including the facts that the accident had occurred in Minnesota and the defendant had demonstrated the "performance" of his vehicle in Minnesota.[58] Other factors calling for an application of Minnesota law were that the injuries occurred in Minnesota and that the accident was investigated by Minnesota law enforcement.[59] After its analysis, the North Dakota Supreme Court determined that Minnesota's contacts with the accident were "minimal."[60] The contacts of North Dakota to the accident were considered more "significant," thus allowing the application of North Dakota law.[61]

It does not seem rational that Minnesota's right to enforce its own traffic laws should be outweighed by the fact that the parties lived and worked in North Dakota.[62] The outcome of *Issendorf* may have been

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or its importance in the case. Brief for Appellant at 25-33, Issendorf v. Olson, 194 N.W.2d 750 (N.D. 1972) (Civ. No. 8775); Brief for Appellee at 16-18, Issendorf v. Olson, 194 N.W.2d 750 (N.D. 1972) (Civ. No. 8775). Apparently, the court decided *sua sponte* to exercise its own initiative in deciding a non-issue.

56. *Issendorf*, 194 N.W.2d at 755. The plaintiff may have been hospitalized in North Dakota, but the record does not confirm this. The lack of any reference to "contacts" in the appellate briefs probably goes to show the lack of a choice of law issue between the parties. *See generally* Brief for Appellant at 25-33; Brief for Appellee at 16-18.

57. *Issendorf*, 194 N.W.2d at 755. The court considered these factors on the North Dakota side of the analysis. *Id.* However, the original complaint listed the car as being licensed in Minnesota. Brief for Appellant at 4, *Issendorf* (Civ. No. 8775).

58. *Issendorf*, 194 N.W.2d at 755. Unfortunately, this "demonstration" ended in the accident at issue in the case. *Id.*

59. *Id.* It should be noted that little qualitative analysis was made of any of the factors favoring either jurisdiction. *Id.*

60. *Id.* The court called the site of the accident "fortuitous," thereby allowing the application of North Dakota law. *Id.*

61. *Id.* at 755-56. It would appear that if the economic interests of North Dakota were so "significant", the court should not have burdened the state by denying the plaintiff's claim. It seems rather perverse for the court to recognize that North Dakota had serious interests in the welfare of the plaintiff and then deny him a recovery. Perhaps the plaintiff would have been wise to file suit in Minnesota as it maintained the traditional place of the wrong rule until 1973. *See* Milkovich v. Saari, 203 N.W.2d 408, 413-17 (Minn. 1973) (replacing the traditional rule with Leflar's considerations). Although in dicta, there was an earlier preference for a significant contacts rule in Minnesota. *See* Balts v. Balts, 142 N.W.2d 66, 70-71 (Minn. 1966) (noting the need for a rule less arbitrary than the place of the wrong).

62. *Issendorf*, 194 N.W.2d at 755-56. The court recited contacts with no regard to any substantive weight. *Id.* *See* RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 6.10 at 309-10 (3d ed. 1986) (asserting that the situs of the tort has the right to enforce its own laws).

the result of a subjective forum bias in favor of North Dakota.[63] The court appears to have merely tallied the contacts and North Dakota won.[64] Regardless of the result of *Issendorf*, it was the decision that forever changed North Dakota's approach to choice of law. The fact that the North Dakota Supreme Court gave cursory analysis to its new theory pales in comparison to the step taken into a modern choice of laws approach. However, problems resulting from the marked lack of substantive analysis demonstrated in *Issendorf* were to manifest themselves in later North Dakota choice of law cases.[65]

North Dakota's next contact with a tort related choice of laws problem came a few scant months after the *Issendorf* decision. *Mager v. Mager*[66] involved a Minnesota resident who was injured in Minnesota and whose only significant contact with North Dakota was that she was hospitalized in Fargo.[67] The trial court, applying Minnesota law, dismissed the complaint as Minnesota still maintained the doctrine of spousal immunity at the time of the accident.[68] The plaintiff appealed, asserting that the law of North Dakota, as it applied at the time of the accident, should control rather than Minnesota law.[69]

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63. The *Issendorf* fact situation was somewhat similar to *Babcock* where a New York plaintiff was allowed to recover for injuries sustained in Ontario. Babcock v. Jackson, 191 N.E.2d 279, 284 N.Y. 1963). In *Issendorf*, the court seemed content to merely list the contacts and render a decision. *Issendorf*, 194 N.W.2d at 755-56. Conversely, the New York court saw fit to analyze the respective interests of Ontario and New York before reaching its conclusion. *Babcock*, 191 N.E.2d at 284-85. It seems reasonable that if the *Issendorf* court had thoroughly analyzed the respective appellate briefs, instead of relying on trial briefs (which did not really raise a choice of laws issue, but rather accepted *Pearson*), the result may have been different. *Issendorf*, 194 N.W.2d at 755-56. While the record does not demonstrate it, the possibility that the court engaged in *de novo* review, without noting it as such, seems quite likely. The court may have seen a glimmer of hope to make a new choice of law standard and used *Issendorf* as the catalyst for change, no matter that the issue was never raised.

64. *Issendorf*, 194 N.W.2d 755-56. *See* LEFLAR, *supra* note 1, § 136, at 383 (warning against a purely quantitative analysis). *See also Babcock*, 191 N.E.2d at 286 (Van Voorhis J., dissenting) (asserting that "'significant contacts' is a 'catchword' which is "inadequate to define a principle of law," and is not "applicable in the realm of torts."). Apparently, the *Issendorf* court placed more emphasis on "contacts" than on their relative significance. Perhaps the court considered "significant" to be synonymous with "contacts," rather than utilizing a separate analysis to determine the significance of the contacts. Rather than just adopting the New York caselaw, the North Dakota Supreme Court should have adopted the same degree of analysis present in *Babcock*. The *Babcock* court extensively weighed the interests of both jurisdictions in deciding whether Ontario's guest statute should apply. *Babcock*, 191 N.E.2d at 282-85. The analysis expressed by the *Issendorf* court was rather cursory, focusing more on mere contacts than actual significance. *Issendorf*, 194 N.W.2d at 755.

65. *See infra* notes 67-146 and accompanying text (discussing later applications of *Issendorf*).

66. 197 N.W.2d 626 (N.D. 1972).

67. Mager v. Mager, 197 N.W.2d 626, 627 (N.D. 1972). The plaintiff was injured when her husband drove their automobile into a train in Argyle, Minnesota. *Id.* She was subsequently transferred from a Warren, Minnesota, hospital to one in Fargo, North Dakota. *Id.* During her hospital stay, the plaintiff's husband was served with process in Cass County, North Dakota. *Id.*

68. *Id.* In a twist of fate, the Minnesota Supreme Court abrogated the doctrine of spousal immunity prospectively, a mere five days after the accident in question. *Id.* at 627-28.

69. *Id.* at 627. The court noted that North Dakota had renounced the doctrine of spousal immunity in Fitzmaurice v. Fitzmaurice, 242 N.W. 526 (N.D. 1932). *Mager*, 197 N.W.2d at 627.

The North Dakota Supreme Court, applying the significant contacts rules adopted in *Issendorf*, ruled that the law of Minnesota, as it stood at the time of the accident, would apply, thus denying the plaintiff's claim.[70] Minnesota was deemed to be the state with the more significant contacts at the time of the accident.[71] The court gave short shrift to the plaintiff's argument that the application of Leflar's "better law" theory should govern the case.[72] The court did not even run through Leflar's five considerations as it had done in *Issendorf*.[73] The court also considered the possibility of the defendant claiming "surprise and injustice" if the court applied North Dakota law[74] finally it considered the respective domiciles of the parties as being Minnesota.[75] As a result, the plaintiff's argument that North Dakota law should apply was dismissed with little discussion.[76]

Compared with its first attempt to use a significant contacts approach in *Issendorf*, the *Mager* court did a reasonable job of applying the facts of the case to a significant contacts analysis in arriving at the final result. After a review of the pertinent facts and law, the North Dakota Supreme Court applied its test and found that Minnesota was the state with more significant contacts and thereby affirmed the trial court's judgment.[77]

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70. *Mager*, 197 N.W.2d at 629.

71. *Id.* at 628. The supreme court restated that the parties were residents of Minnesota and that the entire trip and accident had occurred in Minnesota. *Id.* The supreme court also acknowledged that the plaintiff's only significant contact with North Dakota was her stay in a Fargo hospital. *Id.*

72. *Id. See supra* notes 25-29 and accompanying text (discussing Leflar's theory).

73. *Mager*, 197 N.W.2d at 629. The court distinguished the Wisconsin case cited by the plaintiff, Zelinger v. State Sand & Gravel, 156 N.W.2d 466 (Wis. 1968), from *Mager* on the facts and the laws of the jurisdictions involved. *Id.* Leflar's "better law" theory was expressly used in the Wisconsin case. *Zelinger*, 156 N.W.2d at 473. It is interesting to note that while Leflar's theory had been seemingly approved of in *Issendorf*, there was scant attention paid to it in *Mager*. *See supra* notes 52-61 and accompanying text (discussing the initial inclusion of Leflar's considerations into North Dakota choice of law).

74. *Id.* at 628. Concern about surprise was found nowhere in the court's *Issendorf* decision. The *Mager* court's analysis was much more focused than in *Issendorf*. *See supra* notes 55-64 and accompanying text (discussing the lack of substantive analysis in *Issendorf*). It appears that the *Mager* court merely took the facts of the case at face value and applied its choice of law rule. Fortunately, the facts of *Mager* really did not deserve much analysis. Little attention, however, was explicitly paid to the significance of the existing contacts.

75. *Mager*, 197 N.W.2d at 628. *But see* Russell J. Weintraub, *An Inquiry into the Utility of "Domicile" as a Concept in Conflicts Analysis*, 63 MICH. L. REV. 961 (1965) (questioning the importance of domicile in choice of law problems).

76. *Mager*, 197 N.W.2d at 628. The court explained the irrelevance of the Wisconsin court's reasoning to the facts of *Mager*. *Id.* It is possible that while Leflar's theory had been expressly adopted in Wisconsin in *Zelinger*, 156 N.W.2d at 473, and *implicitly* adopted in *Issendorf*, the court somehow did not see a need for analysis beyond a cursory examination of the relative facts. *Mager*, 197 N.W.2d at 629.

77. *Mager*, 197 N.W.2d 628. However, it should be noted that the court did not attempt to qualify its analysis of the contacts, but again merely tallied them up for each state. *Id.*

C. FEDERAL INTERPRETATIONS OF THE *ISSENDORF* TORT RULES

The federal courts dealing with North Dakota choice of law issues have been fairly adept at applying the *Issendorf* rules. *Riske v. Truck Insurance Exchange*[78] was an action brought by an insured against the defendant for failure to settle a personal injury claim with a third-party in good faith.[79] After the evidence was presented, the jury awarded the plaintiffs $130,000, but the verdict was set aside by the trial court.[80]

On appeal, the Eighth Circuit considered the case under North Dakota choice of law as North Dakota was the forum for the action.[81] The court determined that since Minnesota had the most significant contacts with the action, Minnesota's law of insurer bad faith would apply.[82] Therefore, the trial court's judgment vacation of the jury verdict was overturned by the Eighth Circuit, which remanded the case back to the trial court.[83] While *Riske* was not really a definitive choice of laws case, it was an affirmation that North Dakota's significant contacts approach would be used by the federal courts where North Dakota was the forum.

Another federal case that considered a tort action under the *Issendorf* rules was *Perkins v. Clark Equip. Co.*[84] *Perkins* concerned a products liability action brought against a North Dakota corporation by residents of Iowa.[85] The Eighth Circuit applied North Dakota's choice

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78. 490 F.2d 1079 (8th Cir. 1974).

79. *Riske v. Truck Ins. Exch.*, 490 F.2d 1079, 1081(8th Cir. 1974). The underlying action involved an exchange student who was injured in a snowmobile accident on the plaintiff's Minnesota farm. *Id.* The student commenced a negligence action in federal district court in North Dakota against Riske and others and was awarded $180,000. *Id.* The insurer paid the policy limits of $50,000 and Riske commenced this action against the insurer for failure to "settle the lawsuit or otherwise consider the interests of the Riske's in good faith." *Id.*

80. *Id.* at 1081-82. The trial court found that the evidence could not support the jury verdict. *Id.* at 1082 (citing Riske v. Truck Ins. Exch., 351 F. Supp. 760, 766 (D.N.D. 1972)).

81. *Riske*, 490 F.2d at 1082 (citing Issendorf v. Olson, 194 N.W.2d 750 (N.D. 1972)). The court believed that under the rules of *Issendorf*, Minnesota had the most significant contacts with the action and that the suit had been properly tried under Minnesota law. *Id.* However, no mention was made of Leflar's considerations in the decision, which may indicate that they did not become very relevant until later North Dakota Supreme Court cases began to explicitly utilize them.

82. *Id.* at 1082-83. The court found that even though the injured party's attorney had offered to settle on three separate occasions for amounts of $25,000 and $45,000, which were within the policy limits, the conduct of the insurer in failing to responsibly handle the offers to protect the Riskes was bad faith under Minnesota law. *Id.* at 1083-88.

83. *Id.* at 1088. The Eighth Circuit also allowed the defendant 10 days under Rule 59(b) of the Federal Rules of Civil Procedure to file a motion for a new trial upon remand. *Id.* at n.2. *See also* Riske v. Truck Ins. Exch., 541 F.2d 768 (8th Cir. 1976) (affirming the entry of the verdict for the insureds after remand).

84. 823 F.2d 207 (8th Cir. 1987).

85. Perkins v. Clark Equip. Co., 823 F.2d 207, 208 (8th Cir. 1987). The plaintiff, during the course of his employment, fractured his leg while trying to climb into a Bob Cat Skid Steer Loader manufactured by the defendant. *Id.* After receiving workers' compensation benefits for his injuries, the plaintiff commenced his action in U.S. District Court in North Dakota. *Id.* The defendant moved

of law rules to the appeal.[86] Although *Issendorf* did not address a statute of limitations issue, the Eighth Circuit determined that the North Dakota Supreme Court would probably have applied the significant contacts rules to the facts of the case.[87] The court considered Iowa to be the place with the most significant contacts to the case under the *Issendorf* rules.[88] Finding that the *Issendorf* rules favored application of Iowa law, the Eighth Circuit affirmed the trial court's dismissal of the action.[89]

The most recent federal application of *Issendorf* in a tort case was *Kenna v. So-Fro Fabrics, Inc.*[90] This case dealt with the alleged wrongful death of a North Dakota woman who tripped over a box in a Minnesota fabric store.[91] The plaintiff later commenced a negligence and wrongful death action in U.S. District Court in Fargo, North Dakota.[92] The trial court, after receiving a joint motion to determine which state's law should govern the action, applied Minnesota substantive law and granted the defendant's motion for summary judgment.[93]

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for summary judgment on the grounds that Iowa's two-year statute of limitations had already run. *Id.* The plaintiff argued that North Dakota's six-year statute of limitations applied. *Id.* The trial court granted the defendant's motion and denied the plaintiff's motion to certify the question to the North Dakota Supreme Court. *Id.*

86. *Id.* at 208 (citing Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) (requiring federal courts apply the choice of law rules of the forum in which they sat)).

87. *Perkins*, 823 F.2d at 209. The court considered the statutes of limitation issue to be governed by North Dakota law. *Id.* The court relied on sections 28-01.2-01 through 28-01.2-05 of the North Dakota Century Code (1985) which mandated that in conflicts of law cases, the application of a state's substantive law requires the concurrent application of its statute of limitations. *Id.* at 210. *See* N.D. CENT. CODE §§ 28-01.2-01 to -05 (1985). *See also* WEINTRAUB, *supra* note 62, § 3.2C2 at 64 (calling statutes of limitations substantive for choice of law purposes). WEINTRAUB considered traditional theories construing statutes of limitations as procedural to be "dysfunctional." *Id.* at 62.

88. *Perkins*, 823 F.2d at 209. Some of the contacts the court considered in favor of Iowa law were: the locus of the accident was Iowa, the plaintiff was a resident of Iowa, and Perkins was compensated under Iowa worker's compensation rules. *Id.* Contacts favoring the application of North Dakota law were: the loader was manufactured in North Dakota, the defendant was licensed to do business in North Dakota and the suit was filed in North Dakota. *Id.*

89. *Id.* at 210. Actually, the court also considered some federal issues as well, relating to the denial of certification. *Id.*

90. 18 F.3d 623 (8th Cir. 1994).

91. Kenna v. So-Fro Fabrics, Inc., 18 F.3d 623, 624 (8th Cir. 1994). After her fall, the decedent was transported to a North Dakota hospital and eventually underwent surgery to replace a broken hip. *Id.* at 624-25. After surgery, a blood clot developed which was treated with an anti-coagulant and the decedent's condition improved. *Id.* at 625. Approximately five months after the fall in the store, the decedent was in church where for some unexplained reason she fell on her face sustaining some cuts. *Id.* The decedent returned home with no apparent problems, but awoke later that night in "great distress." *Id.* After being rushed to the hospital, the decedent was treated surgically for a brain hemorrhage, but never recovered and died a day later. *Id.*

92. *Id.* at 623. The plaintiff asserted that the defendant's alleged negligence was the proximate cause of the decedent's death. *Id.* at 625. The defendant responded that the fall at the church was an "intervening, superseding cause" which caused the woman's death. *Id.*

93. *Id.* at 625. Apparently, the trial court relied on section 573.01 of the Minnesota Statutes (1992) which did not allow a personal injury suit to outlive a person. *Id.* at 625 n.1. But that does not explain the dismissal of the wrongful death claim, as Minnesota recognized that cause of action. *Id.* at 623.

On appeal, the Eighth Circuit examined *de novo* the district court's use of Minnesota law.[94] The Eighth Circuit determined that the proper law to apply was that of North Dakota.[95] In an interesting example of how North Dakota's choice of law rules have been interpreted, the court applied Leflar's choice influencing considerations without mentioning a significant contacts rule.[96] The court cited to *Issendorf* and *Plante* to support its belief that the choice of law rule in North Dakota was "choice influencing considerations."[97] The court then proceeded to utilize the considerations to analyze the action.[98] The court determined that North Dakota had an "interest in protecting its residents who are victims of torts" which was "the most significant interest in this case."[99] Therefore, the judgment of the district court was reversed and remanded.[100]

The Eighth Circuit's omissions of any reference to a significant contacts rule in its analysis of North Dakota case law tends to indicate that the express *Issendorf* rules have become somewhat clouded. Recent interpretations of North Dakota's choice of law rules have become a shadow of the *Issendorf* pronouncement.[101] While it is true that the

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94. *Id.* at 625 (citing Birnstill v. Home Savings of Am., 907 F.2d 795, 797 (8th Cir. 1990)).

95. *Id.* at 628. The court reached this result after analyzing the issue under Leflar's considerations. *Id.*

96. *Kenna*, 18 F.3d at 626-28. The court did not list the significant contacts of the action as the North Dakota Supreme Court might have done, but merely examined the case under the auspices of Leflar's theory. The court cited Plante v. Columbia Paints, 494 N.W.2d 140 (N.D. 1992), to support its belief that Leflar's considerations were *the* rule in North Dakota choice of law. *Kenna*, 18 F.3d at 626. *See also infra* notes 132-43, and accompanying text (discussing the significance of *Plante*). It is interesting to note that the federal courts did not even mention Leflar's considerations in the earlier *Riske* and *Perkins* cases, nor were they referred to by the *Kenna* court. *See supra* notes 77-88, and accompanying text (discussing prior federal interpretation of North Dakota choice of law rules). Leflar's considerations were relied almost exclusively upon in *Kenna*. *Kenna*, 18 F.3d at 626-28. This may indicate that North Dakota has quietly shifted to Leflar's theory in its later cases without announcing the change.

97. *Kenna*, 18 F.3d at 626. Apparently, while reading *Issendorf* and *Plante*, the Eighth Circuit ignored or overlooked North Dakota's significant contacts rule as expressed in *Issendorf*. *Id.* at 626-27. Perhaps the Eighth Circuit was confused by the North Dakota Supreme Court's erratic pattern of choice of law decisions. *See infra* part III (discussing some of the most current choice of law cases decided by the North Dakota Supreme Court).

98. *Kenna*, 18 F.3d at 626-27. The court ignored the first three Leflar considerations as this was a tort action. *Id.* at 626. Therefore, the court anointed the remaining two considerations "the most significant." *Id.*

99. *Id.* at 627. The court utilized the fourth Leflar consideration of "governmental interests" in reaching its decision. *Id.* However, the court provided no support for its rationale that North Dakota's interests were more at risk, nor did it make a decision as to which law was "better" under the fifth Leflar consideration. *Id.*

100. *Id.* at 630. The court found that North Dakota substantive law governed the choice of law question as well as the initial cause of action. *Id.*

101. *See infra* part III (discussing later modifications of the significant contacts rule). Granted, *Kenna* was a federal case with little bearing on cases emanating in state courts, but it speaks volumes about the current state of North Dakota's choice of law rules: they are becoming so confused that they provide little guidance to the bench and bar as to which elements of analysis are truly relevant.

Kenna court relied on case law expanding upon *Issendorf*, there is no explicable reason for its profound failure to use the significant contacts analysis. The next section will examine some post-*Issendorf* cases and attempt to demonstrate how North Dakota has made a subtle shift from a strict contacts oriented analysis toward a Leflar-based analysis.

III. CONTRACT AND INSURANCE CASES UNDER THE *ISSENDORF* ANALYSIS

There have been no reported North Dakota choice of law tort cases since 1972 at the state level. However, a number of contract and insurance cases have provided a glimpse of how choice of law thought has evolved in North Dakota. An examination of the continued development of choice of law in the contexts of contracts and insurance may be useful in understanding the current status of North Dakota's rules, as they may be applied in other situations.

There were two reported federal district court cases that utilized the *Issendorf*[102] rules in insurance related cases prior to any North Dakota Supreme Court determinations of whether those rules should apply.[103] *National Farmers Union v. Dairyland Insurance Co.*,[104] was the first reported federal court case applying *Issendorf* to an insurance issue. *Dairyland* concerned the subrogation of no-fault benefits paid by the plaintiff to its insured.[105] The parties, in their motions, indicated that Minnesota law should apply, since it was the place of the accident.[106] However, the trial court did not apply the law of Minnesota, but rather examined the issue under the rules set forth in *Issendorf*.[107] The court presumed that if the North Dakota Supreme Court was hearing the case it would apply the *Issendorf* rules.[108] By applying the *Issendorf* rules, the

102. 194 N.W.2d 750 (N.D. 1972).

103. Issendorf v. Olson, 194 N.W.2d 750 (N.D. 1972).

104. 485 F. Supp. 1009 (D.N.D. 1980).

105. National Farmers Union v. Dairyland Ins. Co., 485 F. Supp. 1009, 1010-11 (D.N.D. 1980). The plaintiff's insured, a North Dakota resident, was injured when the car in which she was riding was struck by a train in Minnesota. *Id.* at 1010. The driver was insured by the defendant in accordance with North Dakota law. *Id.* The plaintiff's insured was paid $10,473.44 by the plaintiff for medical expenses as a result of the accident under the no-fault provisions of the policy. *Id.* The plaintiff then sought reimbursement from the defendant on the premise that the defendant, through its insured, was liable for the injuries. *Id.*

106. *Id.* Apparently, the parties relied upon Nordenstrom v. Swedberg, 143 N.W.2d 848 (N.D. 1966), which required a contract to be governed by the laws of the place where it was to be performed, in this case Minnesota.

107. *Dairyland*, 485 F. Supp. at 1010-11. The court stated that since *Issendorf* there had been no contract cases that might have led to the application of a different standard and that the North Dakota statute requiring the place of the contracting to control a dispute had been abolished. *Id.* at 1011.

108. *Id.* The court reasoned that as North Dakota had adopted New York's significant contacts rule in tort actions in *Issendorf*, it would be inclined to do so for contract actions. *Id.* (citing Auten v. Auten, 124 N.E.2d 99 (N.Y. 1954)).

court determined that North Dakota had more significant contacts to the policies.[109] The court reasoned that the place of the accident was "not significant in contract cases involving a policy of automobile insu rance."[110] The court, relying upon North Dakota law, then granted the plaintiff's motion for summary judgment and denied the same motion of the defendant.[111]

The second federal case to apply *Issendorf* to a contract-based action was *National Farmers Union v. Nodak Mutual Insurance Co.*[112] *Nodak* was a dispute between insurers over the payment and reimbursement of no-fault payments to an injured policyholder.[113] The plaintiff relied on *Dairyland* to reiterate the proposition that *Issendorf* should be applied to insurance contract cases.[114] The key issue for determination was whether North Dakota or Minnesota no-fault law would apply to the case.[115] The trial court, relying on the prior *Dairyland* decision, applied the *Issendorf* rationale to the facts of this case.[116]

The trial court concluded that under the significant contacts analysis, North Dakota law would apply to the case.[117] The defendant had asserted that it would be unfair to apply North Dakota no-fault priority law to the accident, and yet hold it liable for reimbursement under the higher limits of Minnesota law.[118] The court rejected this argument on

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109. *Id.* at 1011. The court stated that the significant contacts in favor of North Dakota law were: the injured party and driver were North Dakota residents, the automobile was registered in North Dakota, and the policies were written in North Dakota. *Id.* The only contact in favor of Minnesota law was that it was the site of the accident. *Id.* The court determined that under North Dakota law, the plaintiff's insured was entitled to benefits and the defendant was liable for reimbursement as it was the insurer of the vehicle in question. *Id.* at 1012 (citing N.D. CENT. CODE §§ 26-41) (Supp. 1977) (repealed 1985)).

110. *Id.* at 1011. This reasoning may have indicated a more contract oriented approach to such cases rather than a concentration on the facts of the underlying tort.

111. *Dairyland*, 528 F. Supp. at 1013. The court also ordered the defendant to reimburse the plaintiff the $10,473.43 previously paid to the injured passenger. *Id.*

112. 528 F. Supp. 1093 (D.N.D. 1981).

113. National Farmers Union v. Nodak Mut. Ins. Co., 528 F. Supp. 1093, 1094-95 (D.N.D. 1981). The plaintiff's insured was injured as a passenger in Minnesota. *Id.* at 1094. Both of the persons involved in the accident registered and insured their vehicles according to North Dakota law. *Id.* The plaintiff's insured was paid $21,740 under the provisions of his policy. *Id.* The plaintiff then sued for reimbursement. *Id.*

114. *Id.* The defendant rejected the *Dairyland* precedent on the facts of the case. *Id.* at 1095.

115. *Id.* at 1095. If North Dakota law applied, the defendant would be liable for reimbursement of the paid benefits; whereas if Minnesota law applied, the plaintiff would not be entitled to reimbursement. *Id.*

116. *Id.* Some factors in favor of North Dakota law were: both insureds were residents of North Dakota; the automobile involved in the accident was registered in North Dakota; and both policies were written under North Dakota law. *Id.* The only factors favoring Minnesota law were: Minnesota was the site of the accident and the plaintiff's insured stored his car in Minnesota. *Id.*

117. *Id.* at 1095-96. The court cited section 26-41-10(2)(a) of the North Dakota Century Code which mandated that "the benefits shall be payable by the basic no-fault insurer of the secured motor vehicle." *Id.* at 1096. N.D. CENT. CODE § 26-41-10(2)(a) (Supp. 1977). In the present case, the secured vehicle was insured by the defendant. *Nodak*, 528 F. Supp. at 1096.

118. *Nodak*, 528 F. Supp. at 1096. North Dakota had limited no-fault benefits to $15,000 while

the basis that the defendant, doing business in several states, could have anticipated its potential exposure in any number of jurisdictions.[119] The court then ordered summary judgment in the plaintiff's favor as North Dakota's no-fault law applied to the case under an *Issendorf* analysis.[120]

The federal cases are an interesting example of the application of the significant contacts method in contract-based actions. Apparently, the federal courts presumed that the North Dakota Supreme Court would do likewise and took it upon themselves to apply *Issendorf* to contract actions.[121] The federal courts' analyses provided a logical progression for North Dakota's evolution in choice of law.

The earliest reported state case to utilize the *Issendorf* rules in a contract-based action was *Apollo Sprinkler Co. v. Fire Sprinkler Suppliers & Design, Inc.*[122] This was not a contract case between the parties but rather was a dispute as to whether North Dakota law governed terms of the defendant's insurance policy.[123] The plaintiff began a garnishment action in North Dakota against the defendant's insurer, Mutual

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Minnesota capped benefits at $30,000. *Id.* If North Dakota law had been applied, the plaintiff would have been left with a $6,147.00 deficit from the benefits it had paid to its insured. *Id.* at 1094.

119. *Id.* at 1096 (citing Hague v. Allstate Ins., 289 N.W.2d 43, 50 (Minn. 1979)).

120. *Id.* at 1097. The trial court also awarded the plaintiff $21,740.00, plus accrued interest at 6 percent. *Id.*

121. National Farmers Union v. Dairyland Ins. Co., 485 F. Supp. 1009, 1011 (D.N.D. 1980). It should be noted that the North Dakota Supreme Court has decided two subrogation issues much like *Dairyland* and *Nodak*, but has not used a serious significant contacts analysis in this context. American Family Mut. Ins. Co. v. Farmers Ins. Exch., 504 N.W.2d 307 (N.D. 1993). The *American Family* court decided that as the case was between insurers, it was thus "statutory" under chapter 26.1-41 of the North Dakota Century Code and did not warrant a traditional significant contacts analysis. *Id.* at 308. N.D. CENT. CODE §§ 26.1-41-01 to -19 (1991 & Supp. 1993). The most recent case involved an insurer seeking subrogation against its insured after the insured settled with a third-party tortfeasor. Starry v. Central Dakota Printing, Inc., 530 N.W.2d 323, 324 (N.D. 1995). The *Starry* court essentially disregarded any significant contacts analysis, and instead relied upon the respective "interests" of the states involved. *Id.* at 326. As in *American Family*, the court favored reliance on no-fault statutes over any degree of significant contacts analysis. *Id.* The court's course of conduct in no-fault cases tends to infer a strict reading of applicable statutes, with a brief examination of "interests." *Id.*

122. 382 N.W.2d 386 (N.D. 1986). Prior to this case, North Dakota had utilized a statutory method of deciding contract related choice of law problems. N.D. CENT. CODE § 9-07-11, *repealed by* 1973 N.D. Laws, ch. 77. Apollo Sprinkler Co. v. Fire Sprinkler Suppliers & Design, Inc., 382 N.W.2d 386, 389 n.2 (N.D. 1986). Apparently, the court believed that the statute was repealed in light of an earlier contract case where the statute had been used, First National Bank of Wibaux v. Dreher, 202 N.W.2d 670 (N.D. 1972). *Apollo*, 382 N.W.2d at 389 n.2. North Dakota does maintain statutory choice of law rules for some particular instances. *See, e.g.*, N.D.CENT. CODE §§ 28-01.2-01 to -05 (1991) (containing choice of law rules for statutes of limitation); N.D. CENT. CODE §41-01-05 (Supp. 1993) (containing choice of law rules for certain Uniform Commercial Code transactions). However, for the purposes of this Note, the cases to be examined deal with non-statutory choice of law problems.

123. *Apollo*, 382 N.W.2d at 387. The parties had contracted for the defendant to provide escutcheons for fire sprinklers installed by the plaintiff. *Id.* After learning that the parts provided by the defendant would not suffice, the plaintiff replaced the parts at a cost of $59,672.82 and sued the defendant for damages under breach of warranty. *Id.* The defendant requested that its insurer defend the initial action, but its insurer refused. *Id.* The parties later stipulated to an agreement in which the defendant confessed judgment in favor of the plaintiff, which allowed the plaintiff to proceed against the insurer. *Id.*

Service Insurance.[124] The trial court concluded that Minnesota law applied to the insurance policy and dismissed Apollo's suit.[125] After the trial court denied the plaintiff's motions to amend the judgment, Apollo appealed.[126] Underlying the plaintiff's appeal was the question of whether a portion of the "Exclusions" clause of the policy was enforceable against the insurer.[127] The North Dakota Supreme Court had previously ruled that such an exclusion would cover a breach of warranty, whereas the Minnesota Supreme Court believed that coverage applied only in a case of ambiguity.[128] In considering the choice of law issue, the North Dakota Supreme Court applied what has been considered "eclectic" analysis into the proper choice of law decision.[129]

The court began a brief summary of choice of law in North Dakota, noting its adoption of the significant contacts rules in *Issendorf*.[130] The court then considered the contacts in light of Leflar's five choice influencing considerations, "[a]s an aid in deciding which jurisdiction has the more significant interest with reference to a particular issue."[131] As a result, the court ruled that the Minnesota law applied and affirmed the trial court.[132]

For some unexplained reason, the court also listed Leflar's considerations in combination with references to the Second Restatement of Conflicts.[133] Without really meaning to perhaps, the court may have

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124. *Id.*

125. *Id.* at 388. The parties had also stipulated to the relevant jurisdictional contacts between the defendant and MSI such as: negotiations for the policy occurred in Minnesota and policy premiums were paid into Minnesota. *Id.* at 387-88. Apparently, this stipulation may have contributed to Apollo's defeat, as it was used by the court in its analysis of the significant contacts. *Id.*

126. *Id.* at 387, 388.

127. *Id.* at 388. The pertinent portion of the policy read as follows: "this exclusion does not apply to a warranty of fitness or quality of the named insured's products[.]" *Id.*

128. *Apollo*, 382 N.W.2d at 388 (citing EMASCO Ins. Co. v. L & M Dev., Inc., 372 N.W.2d 908 (N.D. 1985)); Moorhead Mach. & Boiler Co. v. Employers Commercial Union Ins. Co. 285 N.W.2d 465 (Minn. 1979) (relating to interpretations of insurance contracts).

129. Smith, *supra* note 23, at 1120.

130. *Apollo*, 382 N.W.2d at 388-89. Issendorf v. Olson, 194 N.W.2d 750 (N.D. 1972). Some of the contacts favoring North Dakota law were: Apollo was a North Dakota business, the products in question were stored in a North Dakota warehouse and the plaintiff brought suit in North Dakota. *Apollo*, 382 N.W.2d at 389. Some of the factors favoring Minnesota law included: the defendant was Minnesota corporation, the products were installed in Minnesota, and the insurer was a Minnesota based insurance company. *Id.*

131. *Apollo*, 382 at 389. The court did not really explain how Leflar's theory and the significant contact rules operated together. The appellant had argued for a more qualitative analysis of the contacts based on the court's prior use of Leflar's considerations. Brief for Appellant at 16-25, Apollo Sprinkler Co. v. Fire Sprinkler Suppliers & Design, Inc., 382 N.W.2d 386 (N.D. 1986) (Civ. No. 10971).

132. *Apollo*, 382 N.W.2d at 391. The court did not explicitly consider the quality of the contacts in its decision. But it did consider the extent of the policy's coverage to be the key issue and based its analysis on the insurance contract itself. *Id.* at 390-91.

133. *Id.* at 390-91. Inclusion of the Second Restatement seems especially strange in that both theories are quite distinct but tend to express some of the same principles. *See supra* notes 17 and 18

implied that the significant contacts approach may be the less favored rule in North Dakota. The court seems to have given no thought to the consequences of trying to mesh three different theories into one result.[134]

The next case which demonstrated the current state of North Dakota's choice of law was *Plante v. Columbia Paints*.[135] This case was the result of a declaratory judgment motion brought by the insurer of an alleged tortfeasor.[136] The trial court had held that under North Dakota law, the defendant's insurer was liable, under the policy, to $1,000,000 per pending claim.[137] After entry of the judgment, the insurer appealed, arguing that Washington law should govern the interpretation of the policy instead of North Dakota law.[138]

(containing relevant portions of the RESTATEMENT (SECOND) OF CONFLICTS). *See, e.g.*, Leflar, *supra* note 24 (introducing the respective theories). No real shift to the SECOND RESTATEMENT is demonstrated. Rather, the supreme court combined this reference to "harmonious relations" found in § 6 cmt. d of the SECOND RESTATEMENT with Leflar's "[m]aintenance of interstate . . . order" consideration for no apparent reason. *Apollo*, 382 N.W.2d at 390. The intermingled references to Leflar's theory and the SECOND RESTATEMENT, while not necessary in view of the court's initial analysis, may have been an attempt to demonstrate some choice of laws prowess, especially as the court considered the SECOND RESTATEMENT to be "subsumed" by Leflar's considerations. *Id.* at 390 n.3. But the result of the court's efforts was an instance of judicial "name dropping" of the respective theories with no analytical insight as to their inherent characteristics.

134. While the SECOND RESTATEMENT and the *Issendorf* significant contacts test are somewhat similar, there are some differences in complexity and applicability. *See supra* notes 13-17 and accompanying text (outlining the SECOND RESTATEMENT approach). The court appeared to have been on the verge of concocting some theory, yet to be named, by trying to superficially blend different theories into a reliable choice of laws rule. *Apollo* 382 N.W.2d at 390-91. Perhaps the court's attempt to forge an *Issendorf* standard for non-tort actions contributed to cursory and fairly cumbersome reasoning. The court would have been more responsible if it had tried to limit its analysis to the established *Issendorf* significant contacts/Leflar method. Instead of creating a potential, additional prong of analysis with references to the Second Restatement, it may have been advisable to have simply developed the *Issendorf*/Leflar rules. The necessity for a simple choice of law formula was aptly stated in that, "[t]he realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or a lawyer, is quite lost when engulfed and entangled in it." William Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953). Given the demonstrated complexity of the choice of laws area, the North Dakota Supreme Court would be well advised to keep its rules as elementary as possible, lest it too becomes hopelessly "engulfed."

135. 494 N.W.2d 140 (N.D. 1992). The intervening case of Vigen Constr. Co. v. Millers Nat'l. Ins. Co., 436 N.W.2d 254 (N.D. 1989), reiterated the choice of law analysis in *Apollo*. *Vigen*, 436 N.W.2d at 256-58. The *Vigen* court relied almost exclusively on the *Apollo* analysis to reach its conclusions as to the applicable law in insurance contract disputes. *Id.*

136. Plante v. Columbia Paints, 494 N.W.2d 140, 140-41 (N.D. 1992). The plaintiffs, while employed as painters, were injured by an explosion of paint manufactured by the defendant Columbia. *Id.* at 141.

137. *Id.* The policy had limited the insurer's liability to $1,000,000 per "occurrence," which was further reinforced by an amendment to the policy limiting the insurer's aggregate liability to $1,000,000. *Id.*

138. *Id.* The appellant, utilizing *Apollo* and *Vigen*, argued that the State of Washington had more significant contacts than North Dakota. Brief for Appellant at 4-9, Plante v. Columbia Paints, 494 N.W.2d 140 (N.D. 1992) (Civ. No. 920222).

The North Dakota Supreme Court went about applying the meandering theory it had formulated in *Apollo*.[139] After analysis of the issues, the court decided that the plaintiff's claims were "underlying tort claims" while the issue on appeal was the actual insurance contract that had very little to do with North Dakota.[140]

As a result, considering that the "most compelling North Dakota contact here is that the injured parties were North Dakota residents" the application of North Dakota law was not warranted.[141] The court concluded that there was only one "occurrence" under Washington law, the injury causing explosion.[142] Therefore, the judgment of the trial court was reversed and remanded.[143]

The result of *Plante* was quite reasonable with respect to a significant contacts analysis, in that the respective contacts were set forth with an eye toward a qualitative analysis.[144] The court analyzed Washington's definition of "occurrence" and considered it "sound."[145] The only significant problem with *Plante* was the court's continued insistence on listing other choice of law theories for no apparent reason.[146] It

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139. *Plante*, 494 N.W.2d at 142-44. Apollo Sprinkler Co. v. Fire Sprinkler Suppliers & Design, Inc., 382 N.W.2d 386 (N.D. 1986). The court utilized the strange mix of significant contacts, Leflar's theory, and the SECOND RESTATEMENT, which was introduced in *Apollo*. *Plante*, 494 N.W.2d at 142-144. Some of the contacts which favored application of North Dakota law included: the plaintiff was a resident of North Dakota, he was injured there, and the defendant had distributed the paint in North Dakota. *Id.* at 142. Among the contacts listed in favor of Washington law were: the insurance policy was delivered in Washington, policy premiums were paid in Washington, and the defendant's headquarters was in Washington. *Id.* The appellant's contacts, as in *Apollo*, were based on the insurance contract, rather than the underlying tort. *Id.* The only major contact the defendants had with North Dakota was related to the distribution and use of the paint within the state. *Id.*

140. *Plante*, 494 N.W.2d at 143. The court characterized this case as one more of contract than tort, in which North Dakota's contacts were minimal. *Id.* at 143. However, Leflar notes that "[t]he modern tendency is to treat the contract, the injury and all other related events as part of a single transaction for which the applicable law or laws will be chosen without much attention to whether a tort, a contract, or some other characterization has been made." LEFLAR, *supra* note 1, § 134 at 377.

141. *Plante*, 494 N.W.2d at 143. The court in its analysis tried to avoid "chauvinistic parochialism" by not favoring the plaintiffs based solely on their North Dakota domiciles. *Id.*

142. *Id.* at 144. Apparently, the court was more interested in the terms of the insurance policy at issue, rather than any of the underlying tort claims.

143. *Id.* On remand, the trial court was ordered to enter a "judgment consistent with this opinion" which would probably have limited the insurer's exposure to $1,000,000 as set forth in the policy. *Id.* at 141.

144. *Id.* at 142-44. As has been noted, qualitative analysis is not always a hallmark of North Dakota choice of law decisions. *See supra* part II (examining the use of the significant contacts/Leflar method in tort actions).

145. *Plante*, 494 N.W.2d at 144 n.3. The court concluded that even though Washington had the more significant contacts, it also approved of Washington case law dealing with issues of "occurrence." *Id.* at 144. This may imply that the court could have reached a different result had it not agreed with Washington law.

146. *Id.* at 142-44. The court referred to the significant contacts, Second Restatement, and Leflar theories respectively. *Id.* These theories, as utilized by the North Dakota Supreme Court, appear to serve no other purpose than providing a convenient outline for contact categorization. However, the continued commingling of choice of law theories has the potential to send one of two messages: (1) either; the supreme court is refining its initial commitment to a significant contacts

is apparent the North Dakota Supreme Court must either clarify its significant contacts approach with respect to the inclusion of other theories or somehow narrow its use of those theories in the future. Nonetheless, *Plante* does provide a fairly reliable model of analyzing a North Dakota choice of law problem, with respect to its use of the significant contacts rule and Leflar's theory, but that model needs consistent and reliable application.

IV. CONCLUSION

The *Issendorf* rule has become somewhat clouded by the consistent mixing of other theories and the profound lack of qualification of contacts in subsequent cases. The North Dakota Supreme Court should either restate its choice of law rules within the framework of *Plante*'s "significant contacts, within the Leflar considerations" analysis, or adopt a different rule which provides more objectivity, consistency and ease of use.[147] Whether the court would consider a complete reformation in its choice of law rules is unlikely. However, the current cases have proven themselves to be more concerned with the cursory listing of "contacts" rather than any discernible analysis of "significance."[148]

For the *Issendorf* rules, and their descendants, to truly be the model of North Dakota choice of law, the supreme court must consider *why* the contacts are significant. Of course, this requires counsel to thoroughly analyze their case and make the strongest arguments possible that their contacts have a greater level of significance than their opponent's contacts. Then it must be explained to the court how those contacts are reflected in the Leflar considerations. It is incumbent upon the practitioner to fully dissect the issues involved in their case, under the substantive law of the concerned jurisdictions, to create the proper level of analysis.

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approach or; (2) the court has no real idea of how to grapple with a conflict of laws without resorting to smoke and mirrors.

147. As one author has noted, "[c]onflicts problems are too widespread, of too great practical importance, to be ignored by anyone who would call himself a lawyer. The problems must be thought out and solved in clear, understandable terms." WEINTRAUB, *supra* note 61, § 1.3 at 4. The North Dakota Supreme Court would be wise to follow this advice.

148. *See, e.g.*, Issendorf v. Olson, 194 N.W.2d 750, 755 (N.D. 1972); Apollo Sprinkler Co. v. Fire Sprinkler Suppliers & Design, Inc., 382 N.W.2d 386, 389-90 (N.D. 1986). These cases provide ample demonstration of the mere listing of relevant contacts, with little analysis of their purported significance. In fact, one commentator noted that the *Apollo* decision was marked by "indirection." Smith, *supra* note 23, at 1120. It does not appear that the court has yet changed its unique methodology. The court seemingly has imposed a two-part analysis of conflicts of law in the process: the significant contacts of the case must be noted and then those contacts must be made to fit the Leflar considerations. *See* Plante v. Columbia Paints, 494 N.W.2d 140 (N.D. 1992) (showing the interplay of the two theories). It would appear that the Eighth Circuit Court of Appeals overlooked the first part of this analysis in Kenna v. So-Fro Fabrics, Inc., 18 F.3d 623, 626 (8th Cir. 1993), where it was assumed that Leflar's considerations were the sole rule in North Dakota.

A good model for significant contacts analysis lies in *Babcock v. Jackson*,[149] where the "significant contacts" of the case were fully examined under the auspices of relevant law and policy concerns of the interested jurisdictions.[150] This degree of analysis is *the* level of particularity that the North Dakota Supreme Court should try to emulate. In accordance with some of the more recent cases, analyzed herein, the practitioner must make a concerted effort to explain the *significance* of the contacts before utilizing the Leflar considerations. Such a framework should assure the proper analysis of the choice of law issues as they relate to the application of North Dakota or other substantive law. However, the ultimate responsibility for maintaining a coherent, practical choice of law rule lies with the North Dakota Supreme Court, a responsibility that has yet to be accepted.

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149. 191 N.E.2d 279 (N.Y. 1963).

150. Babcock v. Jackson, 191 N.E.2d 279, 284-85 (N.Y. 1963); *see also supra* notes 48, 59, and accompanying text (discussing North Dakota's wholesale adoption of *Babcock* without the same level of analysis).